Supreme Court, U. S.
FILED
JAN 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-899

UNIVERSITY OF DELAWARE,

Petitioner,

v.

WILLIAM F. KEEGAN, MICHAEL SZUPPER, THOMAS J. MARDAGA, WILLIAM SCHAUBER, and DONALD PIEL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware.

BRIEF FOR RESPONDENTS IN OPPOSITION.

ARLEN B. MEKLER,
WISE & MEKLER,
502 Market Tower,
Wilmington, Delaware. 19801
Attorney for Respondents, William F. Keegan and Michael Szupper.

January 26, 1976.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS.

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR DENYING THE WRIT	6
I. The Judgment Below Is of Limited Application, Applying Only to the Use of College Residence Hall Meeting Rooms by Student Residents on Sunday Mornings	6
II. The Judgment Below Is Consistent With This Court's Judgments in *Zorach v. Clauson*, 343 U. S. 306 (1952) and *Tucker v. Texas*, 326 U. S. 517 (1946)	7
III. The Judgment Below Is Consistent With the Establishment Clause as Explicated by This Court in *Meek v. Pittenger*, 421 U. S. 349 (1975)	8
IV. The Judgment Below That the Petitioner's Refusal to Grant Religious Groups Equal Access to Student Meeting Rooms Constitutes a Violation of the Free Exercise Clause Is Consistent With the Judgments of This Court in *Zorach v. Clauson*, 343 U. S. 306 (1952), and *Sherbert v. Verner*, 374 U. S. 398 (1963)	9
V. Conclusion	10

TABLE OF CASES AND OTHER CITATIONS.

Cases:	Page
Board of Education v. Allen, 392 U. S. 236 (1968)	7
Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915)	5
Engel v. Vitale, 370 U. S. 421 (1962)	7
Everson v. Board of Education, 330 U. S. 1 (1947)	7
Houston v. Moore, 16 U. S. 433 (1818)	5
Keegan v. University of Delaware, Del. Supr., – A. 2d –	10
McCollum v. Board of Education, 333 U. S. 203 (1948)	8
Meek v. Pittenger, 421 U. S. 349 (1975)	8
Radio Station WOW v. Johnson, 326 U. S. 120 (1945)	5
Republic Natural Gas Co. v. Oklahoma, 334 U. S. 62 (1948)	5
Schlosser v. Hemphill, 198 U. S. 173 (1905)	5
Sherbert v. Verner, 374 U. S. 398 (1963)	7, 9
Tilton v. Richardson, 403 U. S. 686 (1971)	6
Tucker v. Texas, 326 U. S. 517 (1946)	7
Walz v. Tax Commission, 397 U. S. 664 (1970)	7
Zorach v. Clauson, 343 U. S. 306 (1952)	6, 7, 8, 9

Statutes:

United States Constitution, Amendment I	Passim
United States Constitution, Amendment XIV	2
28 U. S. C. § 1257	1, 2, 5
14 Del. C. § 5103	3

IN THE

Supreme Court of the United States

—

October Term, 1975

—

No. 75-899

—

UNIVERSITY OF DELAWARE,

Petitioner,

v.

WILLIAM F. KEEGAN, MICHAEL SZUPPER, THOMAS J. MARDAGA, WILLIAM SCHAUBER, AND DONALD PIEL,

Respondents.

—

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

—

BRIEF FOR RESPONDENTS IN OPPOSITION.

—

OPINIONS BELOW.

The opinions of the courts below are set forth at pp. 1-2 and in Appendices A-F of the Petition.

JURISDICTION.

Petitioner has not met the jurisdictional requirements of 28 *U. S. C.* § 1257.

By its opinion of November 12, 1975, the Supreme Court of the State of Delaware remanded the cause to the

Court of Chancery for an evidentiary hearing to determine whether a compelling state interest existed to justify the burden placed on the respondents' free exercise of religion by the petitioner's policy toward religious worship on University property. Petitioner has sought to waive or defer that hearing and to obtain review of the judgment below by writ of certiorari from this Court. Since the Petition does not follow a final judgment, however, it appears that the jurisdictional requisites of 28 *U. S. C.* § 1257 have not been met.

QUESTIONS PRESENTED.

1. Does a state university, by permitting the regular use on Sunday morning of its dormitory facilities by student residents for the conduct of student-sponsored religious worship services, in the same manner as other student group activities, violate the Establishment Clause of the First Amendment?

2. Does a state court ruling that a state university must permit student residents the use of its dormitories for the conduct of student-sponsored religious worship services, in the same manner as other student group activities, violate the Establishment Clause of the First Amendment?

3. Does the refusal of a state university to permit student residents the use of its dormitories for the conduct of student-sponsored religious worship services, in the same manner as other student group activities, violate the Free Exercise Clause of the First Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED.

The pertinent portions of the First and Fourteenth Amendments to the Constitution of the United States are set forth in the Petition at p. 3.

STATEMENT.

Christiana Towers are two high-rise apartment buildings owned by the University of Delaware and rented to its students under nine- and twelve-month leases. Christiana Commons is a building located between the two towers; it contains lounge areas, recreational facilities, and meeting rooms; containing no classrooms or academic facilities, it is primarily designed for the social and recreational use of the student residents.

The charter of the University, 14 *Del. C.* § 5103, provides: "The University shall never be managed or conducted in the interest of any party, sect, or denomination." The University has interpreted this statute to require its ban on the use of University-owned residential property for the conduct of religious worship services.

On September 9, 1973, after repeated requests from the student residents of Christiana Towers, Father Keegan, a Roman Catholic priest of the Wilmington Diocese, celebrated Mass in a meeting room in Christiana Commons. The University notified Father Keegan that such activity was inconsistent with University policy; but Father Keegan stated that he and Father Szupper, the priest recognized by the University as chaplain for its Roman Catholic students, intended to continue such services so long as the student residents requested. At the invitation of the student residents, Father Keegan again celebrated Mass in Christiana Commons on September 16, 1973.

On September 23, 1973, the University locked the doors to Christiana Commons, posting a notice that it was closing the building between 9:00 a.m. and 1:00 p.m. to prevent further religious activities in the residence hall. Father Szupper then led the student residents, who had inivited him to celebrate a Mass, in a religious worship service immediately outside the Christiana residential complex.

The University then filed this action in the Court of Chancery, seeking an injunction commanding the priests not to conduct worship services on University property and not to come upon University property until they formally agreed to abide by the University's ban against religious worship in residence halls. The Court denied the University's request.

The next Sunday, September 30, 1973, Father Szupper returned to the Christiana dormitories at the invitation of the student residents. Once again, the University had locked the doors of the Commons building and Father Szupper celebrated the liturgy outside the dormitory. The priests filed a motion for injunctive relief in the Court of Chancery the next week and, on October 4, 1973, the Court issued a restraining order that barred the University from interfering with the conduct of student-sponsored religious worship in Christiana Commons from 10:30 to noon on Sunday mornings.

During the Chancery litigation, the Bishop of the Roman Catholic Diocese of Wilmington and two Catholic student residents of Christiana Towers joined the suit as intervenors on the defendants' behalf.

After a hearing on the permanent injunction, the Court of Chancery granted the petitioner's motion for summary judgment and denied that of the defendants, holding that the Establishment Clause was not violated by the use of Christiana Commons for the conduct of religious worship services requested by student residents. The Court also held, however, that, absent a showing of a substantial infringement of the students' right to worship, the Free Exercise Clause did not require the University to permit its premises to be used for religious worship services. (Petition, Appendix D).

The defendants appealed to the Supreme Court of Delaware. In its opinion of August 22, 1975 (Petition, Appendix C), that Court held that accommodation by the University of student worship in campus facilities need not violate the Establishment Clause and that, in the absence of a compelling state interest, the students had demonstrated that the University policy infringed their Free Exercise rights. The Court remanded the cause to the Court of Chancery for an evidentiary hearing on the issue of justification for the University policy. The University successfully moved for reargument (Petition, Appendix B). In its opinion of November 12, 1975, the Court adhered to its position, again holding that the Establishment Clause was not violated when a state university permitted its residential facilities to be available for one hour on Sunday mornings for student-sponsored religious worship services and that the Free Exercise Clause was violated by a state university policy that proscribed the use of its residential facilities for the conduct of student initiated religious worship services. Once again, the Court remanded the cause to the Court of Chancery for further proceedings.

It is from the Delaware Supreme Court's judgment and opinion of November 12, 1975, that the University has petitioned for certiorari. The respondents contend that the judgment was not a final judgment capable of invoking this Court's jurisdiction under 28 *U. S. C.* § 1257. *Houston v. Moore*, 16 U. S. 433 (1818); *Coe v. Armour Fertilizer Works*, 237 U. S. 413 (1915); *Schlosser v. Hemphill*, 198 U. S. 173 (1905); *Republic Natural Gas Co. v. Oklahoma*, 334 U. S. 62 (1948); *Radio Station WOW v. Johnson*, 326 U. S. 120 (1945).

REASONS FOR DENYING THE WRIT.

I. The Judgment Below Is of Limited Application, Applying Only to the Use of College Residence Hall Meeting Rooms by Student Residents on Sunday Mornings.

Despite petitioner's efforts to persuade this Court that the judgment below is of "extraordinarily widespread consequence inasmuch as it authorizes every religious denomination to commandeer facilities for the conduct of religious worship services at every tax supported educational institution," the issue presented in this case is a narrow one of limited application and of slight effect.

First of all, the judgment below would not apply to every tax-supported educational institution. This case involves college students, not malleable and impressionable students in grammar schools or high schools. This Court has recognized the qualitative difference between a basic public school education and a supplemental university education. *Tilton v. Richardson,* 403 U. S. 686, 672 (1971).

The judgment below would neither require tax supported colleges and universities to supply facilities for religious worship to each of the 300 religious denominations in the United States nor permit religious organizations to "commandeer" the use of college facilities. The judgment below merely requires the University of Delaware to make residence hall meeting rooms, available to any student group for any other activity, equally available on Sunday mornings for student-initiated religious worship services on a non-discriminatory first-come, first-served basis. As such, the judgment below represents the governmental accommodation of religion encouraged by this Court in *Zorach v. Clauson,* 343 U. S. 306, 313 (1952), and the governmental neutrality in religious matters that this Court has repeatedly found mandated by the First Amendment. *Everson v. Board of Education,* 330 U. S. 1 (1947); *Engel v. Vitale,* 370 U. S. 421 (1962); *Sherbert v. Verner,* 374 U. S. 398 (1963); *Board of Education v. Allen,* 392 U. S. 236 (1968); *Walz v. Tax Commission,* 397 U. S. 664 (1970).

This case deals with particular facts that may be unique. The judgment below has no application to different situations of fact, and it should not be so extended.

II. The Judgment Below Is Consistent With This Court's Judgments in *Zorach v. Clauson,* 343 U. S. 306 (1952) and *Tucker v. Texas,* 326 U. S. 517 (1946).

Once again, the petitioner has attempted to extend the judgment below to apply it to inapposite fact situations; in its attempt, petitioner has seriously distorted the decision actually rendered by the Court below. To characterize this case as one in which public school premises are being used for religious worship is to ignore several subtle but essential characteristics.

This case involves college students, not younger students whose presence in school is compelled by law. This case does not involve classroom or other academic facilities; it involves a social and recreational building attached to a residential apartment complex operated by the University of Delaware in its capacity as a landlord, not in its function as an educational institution. This case does not involve classroom time; it involves an hour on Sunday mornings when no academic activities are held and when most students are asleep. This case should not be compared to *McCollum v. Board of Education,* 333 U. S. 203 (1948), which involved young children in school classrooms during school time; rather, it is similar to *Tucker v. Texas,* 326 U. S. 517 (1946), in which this Court reversed the appellant's conviction for refusing to refrain from re-

ligious activities in a village owned by the Federal Government.

Petitioner also cites several of the numerous cases in which this Court has prohibited as violative of the Establishment Clause any grant of funds to parochial schools, even for non-religious expenditures. Such a fact situation is totally different from that presented here. Here, no additional funds have been requested or expended; the students are merely using a room already made available to student groups by the University, so there is no extra cost to the State. This is merely a case of accommodation and neutrality, principles that this Court has consistently endorsed. Cf. *Zorach v. Clauson, supra.*

There being no conflict between the judgment of the court below and the judgments of this Court, the writ of certiorari sought by petitioner should not issue.

III. The Judgment Below Is Consistent With the Establishment Clause as Explicated by This Court in *Meek v. Pittenger*, 421 U. S. 349 (1975).

Quoting this Court's most recent expression of the factors to be considered in judging state action against the strictures of the Establishment Clause, petitioner contends that the judgment below violates that constitutional provision. Under the test articulated in *Meek v. Pittenger*, 421 U. S. 349 (1975), however, there is no constitutional violation.

The state action to be judged is, of course, the University of Delaware's policy toward providing meeting rooms to student groups. Such a policy clearly has a legitimate secular purpose—to enable students to enhance their education by meeting in groups to work together and to share their experiences. The University's policy of permitting student groups to use its meeting rooms for any purpose, with the single express exception of religious

worship clearly violates the second test—that the primary effect of the State action neither advance nor inhibit religion. Were the University's ban on worship removed, however, the primary effect of the policy would remain secular, neither advancing nor inhibiting religion, but fulfilling the purpose of expanding the University's educational function. Finally, allowing student groups to reserve places to worship in the same manner as other groups are allotted meeting rooms would not foster excessive entanglement between government and religion. Problems concerning the availability and desirability of meeting space already face the University, and it meets those problems by allotting space on a "first-come, first-served" basis. To apply that policy to all groups seeking meeting space would involve no entanglement whatsoever.

Since the judgment below is clearly in accord with this Court's pronouncements as to the meaning of the Establishment Clause, certiorari should be denied.

IV. The Judgment Below That the Petitioner's Refusal to Grant Religious Groups Equal Access to Student Meeting Rooms Constitutes a Violation of the Free Exercise Clause Is Consistent With the Judgments of This Court in *Zorach v. Clauson*, 343 U. S. 306 (1952), and *Sherbert v. Verner*, 374 U. S. 398 (1963).

Despite the intimations of the petitioner, this case does not involve public support for parochial schools; the respondents have never suggested that State support for secular education requires that the State support religious education. Nor have the respondents claimed that the State must provide any religious group with the means for carrying on religious worship.

The argument of the respondents, as accepted and restated by the Supreme Court of the State of Delaware,

is simple, despite the University's desperate efforts to distort it:

> "To allow religious worship groups the same rights and privileges attendant with the use of campus facilities as are accorded other group activities could reflect a lawful accommodation. *Zorach v. Clauson,* 343 U. S. 306, 72 S. Ct. 679, 96 L. Ed. 2d 954 (1952), *Abington School District v. Schempp,* 374 U. S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 944 (1963).
>
> "But when a state policy (as here) impedes the observance of religion and acts as a prior restraint upon all religious worship, as opposed to all other activities it constitutes, in this context, an incidental burden upon the students' rights which requires a showing of a compelling state interest for justification. *Sherbert v. Verner,* 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965, 970 (1963)." (Petition, Appendix C, pp. A14-A15).

V. Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ARLEN B. MEKLER,
WISE & MEKLER,
502 Market Tower,
Wilmington, Delaware 19801
Attorney for Respondents,
William F. Keegan and
Michael Szupper.